Supreme Court, U.S.
FILED

10-17 JUN 29 2010

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APPENDIX

No. _____

In the

Supreme Court of the United States

Benoit Brookens,

Petitioner,

v.

Hilda L. Solis,
Secretary of Labor,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals
For the District of Columbia

No. 09-5249

September Term 2009
1:08-cv-01612-ESH
Filed On: March 31, 2010

Benoit Otis Brookens, II,
Appellant

v.

Hilda L. Solis, Secretary, U.S. Department of Labor,
Appellee

BEFORE: Sentelle, Chief Judge; and Ginsburg, Henderson, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5249
September Term 2009
1 :08-cv-01612-ESH
Filed On: December 9, 2009

Benoit Otis Brookens, II,

Appellant

v.

Hilda L. Solis, Secretary, U.S. Department of Labor,

Appellee

BEFORE: Garland, Brown, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819F.2d 294, 297 (D.C. Cir. 1987) (per curiam). Appellee has offered legitimate nondiscriminatory and nonretaliatory reasons for the failure to promote appellant and for the denial of appellant's request for desk audits, work details, and a within grade increase. Appellant has failed to produce evidence sufficient for a reasonable jury to find that those asserted non-discriminatory reasons

were not the actual reasons, and that the appellee intentionally discriminated or retaliated against him. See Kersey v. WMATA, No. 08-7040 (D.C. Cir. Nov. 10,2009); Jones v. Bernanke, 557 F.3d 670, 678 (D.C. Cir. 2009); Brady v. Office of the Sergeant at Arms, U.S. House of Representatives, 520 F.3d 490, 494 (D.C. Cir. 2008). The district court did not abuse its discretion in denying appellant's request for discovery, because that request lacked the requisite specificity. See Messina v. Krakower, 439 F.3d 755, 762 (D.C. Cir .. 2006).

Finally, as the district court correctly observed, 42 U.S.C. § 1981 does not apply to actions against the United States. See 42 U.S.C. § 1981 (c); Houri v. United States,782 F.2d 227, 245 n.43 (D.C. Cir. 1986), vacated on other grounds, 482 U.S. 64 (1987).

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5249

September Term 2009

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en bane. See Fed. R. App. P. 41 (b); D.C. Cir. Rule 41.

Per Curiam

STATEMENT OF ISSUES, CERTIFICATE OF PARTIES, AND RELATED CASES

Statement of Issues to be Raised

Whether the District Court, citing Bell Atlantic Corp. v. Twombley, 550 U.S. 544 (2007), applied the proper standard for pleading facts in discrimination cases under Title VII of the Civil Rights Act of 1991, (Title VII) in dismissing the claims relating to the denials of the desk audits and details of the plaintiff's complaint, rather than relying on Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002)?

Whether the District Court erred in failing to stay a ruling on the summary judgment portion of the defendant's motion to dismiss pursuant to FRCP 56(f) to provide the non-moving party, under FRCP (56(c), adequate time for discovery as required by Celotex Corp. v. Catrett, Administratrix of the Estate of Catrett, 477 U.S. 317, 322 (1986)?

Whether the District Court erred in granting summary judgment on all claims in plaintiff's complaint?

Whether the District Court erroneously factually characterized plaintiff's request for discovery as "additional" discovery, Decision, p. 21, citing Messina v. Krakower, 439 F.3d 755, 762 (D.C. Cir. 2006) when no discovery at all was conducted by any of the parties in the case?

Whether the District Court abused its discretion in denying any discovery in this case?

Whether the trial court applied an erroneous standard in ruling, in denying a trial de novo, as required by Chandler v. Roudebush, 425 U.S. 861, 48 L.Ed.2d 416, 96 S. Ct. 1949, 1959-60, (1976), that the issues were "fully litigated before the MSPB [Merit Systems Protection Board] where plaintiff and defendant, both of whom were represented by counsel, introduced evidence"?

Whether the District Court erred in ruling that "unresolved factual discrepancies" [Decision p. 20, footnote 16], certificate of eligibles, the selection of Anne Zollner and the promotion of Tim Wedding were irrelevant?

Whether the district court failed to properly apply Burlington Industries, Inc. v. Elbert, 524 U.S. 742, 761-62 (1998) in ruling that the plaintiff 's allegation of "denial of desk audits" (for promotion) and details (with automatic pay increases after 30 days) and promotion potential failed to constitute "adverse employment action" under Title VII?

Whether the district court erred in dismissing "all claims relating to the denials of the desk audits and details and to summary judgment on all claims" in plaintiff's complaint (Decision p. 11)?

Whether the District Court erred in ruling that a federal employee could not bring a cause of action under Title VII of the Civil Rights Act, Section 1981, as amended in 1991, when The City of Milwaukee v. Saxbe, 546 F.2d 693 (Cir.)(1976) holds to the contrary?

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENOIT BROOKENS
Plaintiff,

Civil Action No. 08-1612 (ESH)

HILDA L. SOLIS, Secretary,
Unified States Department of Labor,
Defendant.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, defendant's Motion to Dismiss Complaint or in the Alternative for Summary Judgment [Dkt, # 5, 6] is GRANTED, plaintiff's Motion to Stay [Dkt. # 9] is DENIED, and this case is hereby DISMISSED with prejudice.

SO ORDERED.
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ELLEN SEGAL HUVELLE
United States District Judge

DATE: May 21, 2009

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BENOIT BROOKENS,
Plaintiff,

Civil Action No. 08-1612 (ESH)

HILDA L. SOLIS, Secretary[1],
United States Department of Labor,

Defendant.

MEMORANDUM OPINION

Plaintiff Benoit Brookens has again filed suit against the Secretary of the United States Department of Labor ("DOL") for race and age discrimination and retaliation under Title Vll, 42 U.S.C.. § 2000e *et seq.,* and under the Age Discrimination in Employment Act ("ADEA"), 29U.S.C. § 621 *et seq*[2] In a prior lawsuit before this Court, plaintiff raised claims of

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[1] Hilda Solis, current Secretary of the United States Department of Labor, is substituted for her predecessor. Fed. R. Civ. P. 25(d).

[2]Plaintiff also purports to bring this action under 42 U .S.C. § 198 L However, as a federal employee, plaintiff may not bring an employment discrimination claim pursuant to § 1981. *Robinson* v. *Chao,* No. 05-5445,2006 U.S. App. LEXIS 12550, at *3 (D.C. Cir. May 2, 2006); *Prince* v. *Rice,* 453 F. Supp, 2d 14,25-27 (D.D.C. 2006).

discrimination and retaliation regarding three positions to which defendant failed to promote him. On October 21, 2008, this Court granted summary judgment in that case, and this ruling was summarily affirmed. *Brookens v. Chao,* No. 08-0086 (D.D.C. Oct. 21, 2008) *("Brookens*

I), aff'd sub nom. Brookens v. *Solis,* No. 08-5527 (D.C. Cir. May 8,2009) (per curiam[3] In the instant suit, plaintiff complains about a number of other employment decisions, including denials of promotions, detail requests, desk audits, and a within-grade increase ("WGI") in pay. This matter comes before the Court on defendant's Motion to Dismiss Complaint or in the Alternative for Summary Judgment and on plaintiff's Motion to Stay. For the reasons set forth below, the Court will grant defendant's motions and deny plaintiff's motion.

BACKGROUND

Plaintiff is an African-American male over age forty who holds law and graduate business degrees from Columbia University, New York, New York. (Compl, paras. 7,8.) He has previously practiced law and

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[3] In *Brookens I,* this Court dismissed the suit at the outset, finding that defendant had set forth legitimate, nondiscriminatory reasons for its employment decisions, and plaintiff had failed to adduce evidence that could allow a reasonable trier of fact to conclude that those reasons were pretextual.

taught as an adjunct professor at the University of Virginia, Falls Church, Virginia. *(Id. para.* 9.) Starting in 1990, he was employed by the DOL as an International Economist in the Bureau of International Labor Affairs ("ILAB") at grade GS, -12. *(Id . para.* 10,13.)

In February 2007, defendant posted vacancy announcement ILAB *07-068DE/M* for a Chief of ILAB's Trade Policy and Negotiations Division. *(I. para.* 29.) Plaintiff submitted an application for the position in March. *(Id.* 130; Declaration of Erick a Witt, dated Jan. 5, 2009 ["First Witt Decl."] ,para. 14(b).) That same month, he also requested a 60-day detail to the position, which was denied. (Compl. para. 31.) In April 2007, plaintiff was notified that he was not certified for the position because he failed to meet the time-in-grade requirement. *(Id.* para. 32.) Plaintiff, believing that he was qualified, initiated a formal complaint, but the vacancy announcement was

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cancelled in May 2007. *(Id. paras.* 33-34.) Around the same time, plaintiff requested a second detail to the position and a desk audit, both of which were denied.[4] *(Id.* paras. 35-36.) In July 2007, defendant re-posted the

[4]According to defendant, "[desk audits are reviews of an employee's current responsibilities to determine whether an employee is actually performing responsibilities at a grade level higher than the current classification," (Declaration of Gregory K. Schoepfe [Schoepfle Decl.] para. 9.)

position for Chief of the Trade Policy and Negotiations Division in vacancy announcement ILAB 07-157*DE/M* and listed additionalqualifications that had not been included in the prior vacancy announcement. *(Id. paras.* 37-38.) Plaintiff was again determined to be unqualified for the position. *(See* First Witt Decl. para. 15(d),) Instead, Timothy Wedding, a white male whom plaintiff claims was less qualified in the area of trade and policy negotiations and needed training by plaintiff and others to perform the duties of the position, was selected for the vacancy. (Compl. paras. 41-42.) In August 2007, prior to Mr. Wedding's appointment, plaintiffs request for a detail as Acting Chief of the Trade Policy and Negotiations Division was denied. *(Id. para.* 24(c).) Plaintiff then filed a formal administrative complaint alleging race and age discrimination and reprisal based on the DOL's determinations that he was unqualified for the twice-advertised ILAB vacancy and the denial of his requests for details to that position and a desk audit.[5] *(Id. para.* 43; Declaration of Naomi Barry-Perez [Barry-Perez Decl.] Attach. 1.)

In December 2007, Mr. Wedding, who by that time had been appointed Chief of the Trade Policy and Negotiations Division, denied plaintiffs request for a desk audit and a WGI. (Compl. paras. 24(e), 46.) Plaintiff thereafter requested reconsideration of the denial of his WGI,

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[5] According to defendant, this administrative action was dismissed after plaintiff filed the instant lawsuit. (Motion to Dismiss or for Summ. J. at 19.)

which was denied. (*See* Schoepfle Decl. para. 11; Def.'s Ex. A, *Brookens v. Dept of Labor,* MSPB No. DC-531 D-08-0302-1-1, at 3 (May 1, 2008).) In March 2008, plaintiff filed a formal administrative complaint of discrimination regarding the December 2007 denials of a desk audit and WGI. Both claims were dismissed as untimely, and the WGI claim was also dismissed because plaintiff had elected to file an appeal with the Merit Systems Protection Board ("MSPB"). (Compl, para. 51; Barry-Perez Decl. para. 4.) The MSPB affirmed the DOL's decision to deny plaintiffs WGI and also found that plaintiff had failed to support his allegations of age discrimination and reprisal, and thereafter, the Equal Employment Opportunity Commission ("EEOC") upheld the finding of no discrimination.[6] (Def.'s Ex. A, *Brookens* v. *Dep't of Labor,* MSPB No. DC-531 D-08-0302-1-1 (May 1, 2008)); *Brookens v. Chao,* No. 0320080075, 2008 WL 4107416 (B.E.O.C. Aug. 19, 2008).

In this case, in addition to alleging that these actions constituted age and race discrimination, plaintiff also alleges that defendant's actions were in retaliation for his having filed complaints with the EEOC, the MSPB, and this Court[7] (*See* Com pl. paras. 18-25.)

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[6]Plaintiff did not allege race discrimination before the MSPB.

[7]In his complaint, which was filed on September 19, 2008, plaintiff also alleges that defendant issued a proposal on September 5, 2008, to remove him from federal service in retaliation for his prior EEO activity. (Compl, ~ 23.) However,

Before the Court are defendant's motion to dismiss the complaint or in the alternative for summary judgment, plaintiff's opposition, and defendant's reply, as well as plaintiff's motion to stay the Court's ruling on defendant's summary judgment motion pending completion of discovery.

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defendant's opposition, and plaintiffs reply. The issues before the Court, listed in the order in which they will be addressed, are as follows:

(1) whether the DOL discriminated against plaintiff based on his race and/or age or retaliated against him based on his prior EEO activity when the agency denied his requests for details in March, May, and August 2007 and his requests for desk audits in May and December 2007;

(2) whether the DOL discriminated against plaintiff based on his race and/or age or retaliated against him based on his prior EEO activity when the

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given that plaintiff filed his complaint just 14 days after defendant's issuance of its proposal, plaintiff could not have exhausted his administrative remedies prior to filing suit, a requirement for claims brought under both Title VII and the ADEA. *See Washington v. Washington Metro. Area Transit Auth., 160*
F.3d 750, 752 (D.C. Cir. 1998). Therefore, the Court cannot address this issue here.

agency failed to select him for the position of Chief of the Trade Policy and Negotiation Division in response to vacancy announcement ILAB *07-068DE/M* or ILAB 07-157 DE/M; and

(3) whether the DOL discriminated against plaintiff based on his race and/or age or retaliated against him based on his prior EEO activity when the agency denied his WGI in December 2007.

ANALYSIS

I. LEGAL STANDARDS

A. Motion to Dismiss

A case must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted if the complaint does not plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). The allegations in plaintiff's complaint are presumed true at this stage and all reasonable factual inferences must be construed in plaintiffs favor. *Maljack Prods., Inc.* v, *Motion Picture Ass'n of Am., Inc.,* 52 F.3d 373, 375 (D.C. Cir, 1995). However, "the court need not accept inferences drawn by plaintiff if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." *Kowal* v. *MCI Commc'ns Corp.,* 16F.3d 1271, 1276 (D.C. Cir. 1994). To survive a motion to

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dismiss, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly,* 550 U.S, at 555. In this case, plaintiff is proceeding *pro se.* The Court is therefore mindful that "complaints or motions drafted by *pro se* plaintiffs are held to 'less stringent standards than formal pleadings drafted by lawyers.'" *Shankar v. ACS-GSI,* 258 Fed. Appx. 344, 345 (D.C. Cir, 2007) (quoting *Greenhill* v, *Spellings,* 482 F.3d 569, 572 (D.C. Cir. 2007»). Plaintiff, however, is a lawyer and an experienced litigant, having pursued the employment discrimination lawsuit in *Brookens I,* as well as numerous other lawsuits before this Court and the D.C. Circuit.[8]

B. Motion for Summary Judgment

A party is entitled to summary judgment if the pleadings on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ, P. 56(c). Material facts

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[8] *See, e.g., Brookens v. White,* 836 F.2d 653 (D.C. Cir, 1987); *Brookens* v. *us,* 627 F.2d 494 (D.C. CiL 1980); *In re Brookens,* No. 04-145 *(D.D.C.* Mar. 9, 2004); *Brookens* v. *Local I2 AFGE, AFL-CIO,* No. 01-1366 (D.D.C. Mar. 28, 2002); *Brookens* v. *Binion,* No. 98-838 (D.D.C. Feb. 9, 1999), *rev'd,* No. 99-7030, 2000 U.S. App. LEXIS 2055 (D.C. Cir. Jan. 28, 2000); *Brookens* v. *Schultz,* No. 86-3452 (D.D,C. Oct. 9, 1992), *aff'd sub nom. Brookens v. Christopher,* No. 92-5458, 1993 U.S. App. LEXIS 21231 (D.C. Cir. June 8, 1993). In each of these cases, plaintiff proceeded *pro se.* Moreover, while plaintiff ultimately obtained counsel in *Brookens I,* he initially filed suit *pro se.*

are those that "might affect the outcome of the suit under the governing law." *Anderson* v. *Liberty Lobby. Inc.,* 477 U.S. 242, 248 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp.* v. *Catrett,* 477 U.S. 317,322 (1986). In considering whether there is a triable issue of fact, the Court must draw all reasonable inferences in favor of the non-moving party. *Anderson,* 477 U.S. at 255. The party opposing a motion for summary judgment, however, "may not rely merely on allegations or

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denials in its own pleading; rather, its response must...set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2). The non-moving party must do more than simply "show that there is some metaphysical doubt as to the material facts." *Matsushita Elcc. Indus. Co., Ltd.* v. *Zenith Radio Corp.,* 475 U,S. 574, 586 (1986). Moreover, "any factual assertions in the movant's affidavits will be accepted as being true unless [the opposing party] submits his own affidavits or other documentary evidence contradicting the assertion." *Neal* v. *Kelly, 963* F.2d 453, 456 (D.C. Cir.1992) (quoting *Lewis* v, *Faulkner,* 689 P,2d 100, 102 (7th Cir. 1982)).

Title VII and the ADEA

1. Prima Facie Case

To succeed on a claim of discrimination under Title VII and the ADEA, a plaintiff has the initial burden of establishing a *prima facie* case of discrimination by showing that "(1) [he] is a member of a protected class; (2) [he] suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination." *Stella* v. *Mineta,* 284 F.3d 135, 145 (D.C. Cir. 2002); *see also McDonnell Douglas Corp.* v, *Green,* 411 U.S. 792, 802 (1973); *Carter v. George Washington Univ.,* 387 F3d 872, 878 (D.C. Cir. 2004) (applying *McDonnell Douglas* framework to ADEA claims). A *prima facie* case of retaliation requires a plaintiff to show that "(1) [he] engaged in statutorily protected activity; (2) [he] suffered an adverse employment action; and (3) there is a causal connection between the two." *Taylor* v. *Small, 350* F. 2d 1286, 1292 (D.C. Cir. 2003); *see also* 42 U.S.C. § 2000e-3(a). Should plaintiff fail to make out *a prima facie* case with respect to any claim, that claim must be dismissed.

Pursuant to' this standard, to make out a *prima facie* case of either discrimination or retaliation, plaintiff must show an adverse action, which is defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly

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different responsibilities, or a decision causing significant change in benefits." *Douglas* v, *Preston,* 559 F.3d 549, 552 (D.C. Cir. 2009) (citation and internal quotation marks omitted).
"An employee suffers an adverse employment action if he experiences materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." *Forkkio* v, *Powell,* 306 F 3d 1127, 1131 (D.C Cir. 2002) (citing *Brown* v. *Brody,* 199 F 3d 446, 457 (D.C Cir. 1999)) In most cases, a tangible employment action "inflicts direct economic harm." *Douglas,* 559 F.3d at 552 (quoting *Burlington Indus., Inc.* v. *Ellerth,* 524 U.S. 742, 762 (1998)). However, where the alleged significant change in employment status is not obvious, "an employee must go the further step of demonstrating how the decision nonetheless caused such an objectively tangible harm," which requires a court "to consider whether the alleged harm is unduly speculative," *Id* at 553.

For a retaliation claim, the concept of adverse action is broader than in the discrimination context and "can encompass harms unrelated to employment or the workplace 'so long as a reasonable employee would have found the challenged action materially adverse. '" *Rattigan* v. *Holder,* No, 04-2009,2009 U.S. Dist. LEXIS 26495, at *27 (D.D.C. Mar. 30, 2009) (quoting *Baloch v. Kempthorne,* 550 F. 2d 1191, 1198 n.4 (D,C. Cir. 2008) (citation and internal quotation marks omitted). To be materially adverse, the action must be one that "well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe*

Ry. Co. v, *White,* 548 O.S. 53, 68 (2006) (quoting *Rochon v. Gonzales,* 438 FJd 1211, 1219 (D.C. Cir. 2006)).

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2. Pretext

Once a plaintiff establishes a *prima facie* case, the burden shifts to the defendant to produce evidence that the challenged action was taken for a legitimate, nondiscriminatory reason. *See Holcomb v. Powell,* 433 F. 2d 889, 896 (D.C. Cir. 2006). Once a defendant has done so, the presumption of discrimination "simply drops out of the picture," and "the plaintiff must show that a reasonable jury could conclude from all of the evidence that the adverse employment decision was made for a discriminatory reason." *Id.* at 896-97 (citations omitted). "All of the evidence" may include (1) evidence establishing the plaintiff s *prima facie* case; (2) evidence attacking the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff, such as independent evidence of discriminatory statements or attitudes on the part ofthe employer.[9] *Id.* at 897.

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[9]As cautioned by the D.C. Circuit in *Brady* v. *Office of the Sergeant at Arms,* 520 F.3d 490,494 (D.C. CIL 2008), when reviewing a motion for summary judgment in a discrimination case, a district court need not - and should not - evaluate a plaintiff's *prima facie* showing where a defendant sets forth a legitimate, nondiscriminatory reason for its conduct. *Brady* v. *Office of the Sergeant at Arms,* 520 F3d 490, 494 (D.C. Cir. 2008).

II. PLAINTIFF'S CLAIMS

Applying these standards, the Court will now turn to plaintiffs claims. With respect to Plaintiff's claims regarding the denials of a 60-day detail in March 2007 and then again in May 2007 and a detail in August 2007 and the denial of desk audits in May and December 2007,defendant argues that it is entitled to dismissal because these denials do not constitute an adverse action, or in the alternative, summary judgment should be entered because plaintiff has failed to rebut defendant's legitimate, nondiscriminatory reasons for these denials.

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With respect to plaintiff's claims regarding defendant's failure to promote him on two occasions to the Chief of Trade Policy and Negotiations Division, which is a GS-1S Supervisory International Economist position, and defendant's denial of a WGI in December 2007, defendant argues that it is entitled to summary judgment because plaintiff has failed to

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Instead, the court must look to whether the plaintiff has "produced sufficient evidence for a reasonable jury to find that the employer's asserted non-discriminatory reason was not the actual reason and that the employer intentionally discriminated against [the plaintiff]." *Id.* (citations omitted); *Jones* v. *Bernanke*, 557 F.3d 670, 678 (D.C. Cir. 2009) (applying same principles to retaliation claims).

cast doubt on defendant's nondiscriminatory explanation that plaintiff lacked the necessary qualifications for a promotion to this position, and he could not qualify for a WGI due to his deficient performance rating.

In response, plaintiff essentially takes the position that the Court should stay ruling on the motion for summary judgment since he has not had the chance to take discovery and that he should be able to get statistical data as to defendant's policy and practices relating to "hiring, promotion, desk audits, step increases, grade increases, performance evaluation and firing practices." (Pl.'s Mot. to Stay at 2.) In his reply, plaintiff also argues that the allegations of his complaint are satisfactory since desk audits and details "fall in the Court's definition of adverse employment actions," *(see* Pl.'s Reply at 4), and that summary judgment should be denied on the grounds that he has satisfied the requirements of Fed, R, Civ, P. 56(f). *(Id.* at 3.) In particular, plaintiff asserts that he expects "that discovery will be able to disclose genuine issues of material fact" *(id.* at 2), and in particular, in his affidavit, he claims that discovery will reveal, *inter alia,* that he was the victim of discrimination and retaliation, that the reasons for the various actions by defendant are false, that plaintiff was qualified for the two positions, that he was treated less favorably than younger white employees, and that there is a history of race and age

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discrimination at the DOL/ILAB. (*See* Affidavit of Benoit Brookens in Support of Motion to Stay and Discovery [Brookens Aff.] paras. 6-14.) As discussed more fully herein, the Court is persuaded that defendant is entitled to dismissal of the claims relating to the denials of the desk audits and the details and to summary judgment on all claims on the grounds that plaintiff has offered no rebuttal to defendant's legitimate, non-discriminatory explanations for its actions nor is he entitled to Rule 56(f) discovery.

A. Denial of Detail and Desk Audit Requests

In his reply, plaintiff claims, without explanation, that "a desk audit and detail fall in the Court's definition of adverse employment action:" (Pl.'s Reply at 4.) But in his complaint, plaintiff alleges that a detail to the position of Trade Policy and Negotiations Division Chief would have "provided] him training, experience and promotional or advancement opportunities" and, likewise, that a desk audit would have "assess[ed] his competence and performance for purposes of promotional or advancement opportunities." (Compl. para.16(e), (f).) Even assuming the truth ofthese allegations, as one must at this stage, plaintiff's claims as to the denial of desk audits and details do not constitute adverse employment actions, and thus, he cannot establish a *prima facie* case for either discrimination or retaliation. Paced with similarly vague and speculative assertions, the D.C. Circuit has held that the denial of a detail does not constitute an adverse action. *See Maramark* v, *Spellings,* No. 06~5099, 2007 U.S. App. LEXIS 22545, at *2 (D.C. Cir. Sept. 20,

2007) (denial of a five-month detail that might have allowed plaintiff to secure a permanent position was "too speculative to constitute an objectively tangible harm" (citation and internal quotation marks omittedj); *Stewart* v. *Evans,* 275 P.3d 1126, 1135 (D.C. Cir. 2002) (denial of "acting" designation cannot be considered an adverse

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employment action because "this type of temporary designation is not one of the terms, conditions, or privileges of employment contemplated by Title VII"); *Taylor* v. *FDIC,* 132 F.3d 753, 764 (D.C. Cir. 1997) (repeated failure to designate plaintiffs as acting section chief when their superiors temporarily left the office is insufficient to constitute an adverse employment action); *see also Nichols v. Truscott,* 424 F. Supp. 2d 124, 136-37 (D,D.C. 2006) (the denial of requests for detail assignments and requests to serve as Acting Branch Chief did not constitute adverse employment action). Similarly, the Fifth Circuit has found that the denial of a desk audit is "not an actionable 'adverse personnel action' under Title VI!." *Dollis* v. *Rubin,* 77 F.3d 777, 782 (5th Cir. 1995); *see also Douglas,* 559 F. 2d at 553 (department head's failure to recommend employee for a Presidential Rank Award did not constitute adverse employment action);
Edwards v, *EPA,* 456 F, Supp. 2d 72, 86 (D.D.C. 2006) ("[T]o be adverse, the denial of a travel or training opportunity must have a discernible, as opposed to a speculative, effect on the terms, conditions, or privileges of one's employment."). This result does not

change under the more lenient standard set forth in *White* for retaliation claims. For, as noted in *White*, the anti-retaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." 548 U.S. at 67. Here, plaintiff does not allege any injury or harm resulting from these denials, and whether any materially adverse consequences could have resulted from these denials is mere speculation.[10]

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Sewell v. Chao, 532 F. Supp. 2d 126, 137 (D.D.C. 2008) (denial of training and transfer to another department did not constitute adverse employment actions for purposes of a retaliation claim), *aff'd sub*

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[10]In fact, neither a detail nor a desk audit would have qualified plaintiff for the position of Chief of the Trade Policy and Negotiations Division, which he sought in March and July 2007. A temporary detail in March, May, or August 2007 or a desk audit in Mayor December 2007 simply would not have enabled plaintiff to meet the time-in-grade requirement under merit staffing procedures or the one-year specialized experience requirement under delegated examining procedures. *See* Section II(B) *infra*, Moreover, the first vacancy announcement (ILAB 07-068) was cancelled by defendant in April 2007, before plaintiff made either desk audit request, and the second vacancy announcement (ILAB 07-157) was filled prior to plaintiffs second desk audit request. (*See* First Witt Decl. para. 14(k), 16.) Thus, neither desk audit request could have had any impact on plaintiff's consideration for the position in the first vacancy announcement, and the second request could not have impacted his consideration for the position in the second vacancy announcement.

nom. Sewell v. Hugler, No. 08-5079, 2009 U.S. App. LEXIS 4136 (D.C. Cir. Feb. 25, 2009) (per curiam). Moreover, even if plaintiff could make out a *prima facie* case of discrimination or retaliation on the basis of the denials of details and desk audits, he has failed to rebut the legitimate reasons defendant has proffered for the denial of the details and the December 2007 desk audit. Specifically, with respect to the details, Gregory K. Schoepfle, the Director of the Office of Trade and Labor Affairs in ILAB, states that after the retirement of the then Chief of the Trade Policy and Negotiations Division in December 2006, he designated his Deputy Director, Carlos Romero, a GS-15 Supervisory International Economist, to serve as acting chief of the division until the position could be permanently filled, (Schoepfle Decl. para. 5.) Thus, Mr. Romero concurrently served in both positions until the division chief position was filled in September 2007, *(Id.)* While Mr. Romero took a two-week vacation in August 2007, Mr. Schoepfle states that he, as office director, supervised the activities of the division during that time. *(Id. para.* 8.) Accordingly, because no detail opportunities were available when plaintiff made his requests, Mr. Schoepfle denied them. *(Id. paras.* 6-8.) Plaintiff has offered no evidence to contradict these assertions or to otherwise raise an inference that the reasons offered by Mr. Schoepfle were pretextual.

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Moreover, with respect to the December 2007 desk audit request, Mr. Wedding, plaintiff's supervisor at

the time, indicates that plaintiff requested the desk audit the day after the denial of his WGI, which in turn was based on his most recent performance rating of "Minimally Satisfactory" and subsequent performance deficiencies. (*See* Declaration of Timothy J. Wedding [Wedding Decl.] paras. 5-6; Def.'s Ex. A, *Brookens v. Dep't of Labor*, MSPB No. DC-531 D-08-0302-1-1, at 7 (May 1,2008); *see also* First Witt Decl. para. 18.) Mr. Wedding states that he denied the request because he "did not believe there had been any significant material changes to [plaintiff's] position" and because plaintiff performed significantly less work than other International Economists." (Wedding Decl. para.7.) "An employer is entitled to rely on his perception of an employee's work performance." *Vasilevsky* v, *Reno,* 31 F. Supp. 2d 143, 149 D.D.C. 1998). Plaintiff has made no effort to dispute these assertions, even though they involve matters clearly within his knowledge. Accordingly, even if plaintiff has established *prima facie* case, defendant would still be entitled to summary judgment with respect to the denial of plaintiff's detail and December 2007 desk audit requests.

B. Failure to Promote

Plaintiff alleges that defendant's failure to select him for the Chief of the Trade Policy and Negotiations Division position posted first in vacancy announcement ILAB 07-068DE/M and again in vacancy announcement ILAB 07 . *157DE/M* was the result of discrimination and retaliation for his protected activity. In response, defendant moves for summary judgment on the

basis that plaintiff was unqualified for both of these positions.

To support its claim, defendant submits the declaration of Ericka Witt, the Human Resources Specialist who was responsible for staffing both vacancy announcements. Ms. Witt indicates that the position, which was for a GS-15 Supervisory International Economist, was

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announced under delegated examining (DE) and merit staffing (MS) procedures.[11] (First Witt Decl. paras. 5,6.) She explains these procedures as follows: Vacancies at Grade OS-12 and higher that are in the competitive service and are advertised under MS appointment are subject to a time-in-grade eligibility requirement pursuant to which the applicant must have 52 weeks of experience at the next lower GS grade level, in this case OS-14. *(Id.* para. 10.) While vacancies filled under DE procedures do not contain this time-in-grade requirement, applicants must meet both basic requirements and specialized experience criteria listed in the Office of Personnel Management's Individual Occupational

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[11]Ms. Witt explains that "DE" refers to the type of appointment used for the general public to apply to competitive service vacancies, while "MS" refers to the type of appointment by which federal employees apply to vacancy announcements in either the competitive service or excepted service. (First Witt Decl. para. 7, 10.) However, federal employees may apply under either DE or MS procedures or both. *(Id. para. 11.)*

Requirements. *(Id. para.* 17.) Specialized requirements for GS-13 and higher positions in the GS-110 Economist series require candidates to possess one year of specialized experience equivalent to the next lower grade level, in this case GS-14. *(Id.para.* 9.)

Ms. Witt states that plaintiff applied under DE and MS procedures for vacancy announcement ILAB 07-068 and under DE procedures for vacancy announcement ILAB 07-157. *(Id para.* 12.) He was neither certified nor were his application materials forwarded to the selecting official for consideration in either case.[12] *(See id.* paras.14(d), (j), 15(d).) With respect to the ILAB

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[12]Ms. Witt states that she received 12 applications for vacancy announcement ILAB 07- 068DE and six applications for vacancy announcement ILAB 07-068M. (First Witt Decl. 14(c).) Based on her review, she certified three of the candidates under DE procedures and sent their applications to the selecting official for consideration. Two others met the cut-off score but were not certified; four applicants did not meet the cut-off score; and three applicants, including plaintiff, were deemed unqualified. *(Id.* para. 14(d).) Ms. Witt does not indicate whether she certified any applicants under MS procedures. She indicates that she received 12 applications for vacancy announcement ILAB 07-157DE. Based on her review, she certified four of the candidates and sent their applications to the selecting official for consideration. Eight applicants, including plaintiff, were deemed unqualified, *(Id* para 15(d).)

07-068 vacancy announcement, Ms. Witt indicates that she determined that plaintiff, a GS-12 employee, was not qualified under the DE appointment criteria because he did not possess one year of specialized experience equivalent to the GS-14 level. *(Id.* paras. 14(f)-(i).) She explains that plaintiff's adjunct teaching experience, which he contends qualifies him "for higher level promotional and advancement opportunities" (Cornpl. ~ 160»), was not sufficient to satisfy the specialized experience requirement. *(Id.* paras. 14(g), 15(g) and Attach 1.) Similarly. Ms. Witt determined that plaintiff was unqualified for the ILAB 07-068 position under the MS appointment criteria because he did not have 52 weeks of time-in-grade experience at the GS-14 level.[13] *(Id* para. 14j).)

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[13]Plaintiff appears to suggest that defendant's ulterior motive for cancelling vacancy announcement ILAB 07-068 was to avoid hiring him, *(See* Compl. paras. 29-40.) Defendant, however, has established that plaintiff was unqualified while several others applicants did meet the requirements of the position. Moreover, defendant has provided a nondiscriminatory explanation for cancelling the vacancy, which plaintiff has failed to rebut Specifically, Mr. Schoepfle, who was the selecting officer, indicates that after reviewing the Certificate of Eligibles for the position, which did not include plaintiffs name, he decided to cancel the posting with the intention of redescribing the skill and experience questions and thereafter reposting the position in order to attract a more diverse candidate pool. *(See* Schoepfle Decl. para. 3.) Summary judgment is appropriate when an employer cancels a vacancy for legitimate, nondiscriminatory reasons. *See e.g., Lester* v. *Natsios,* 290 F. Supp. 2d 11,26 (D,D.C. 2003) (granting summary judgment when "defendant has convincingly explained that the vacancy was cancelled because the responsible manager wanted to recast the position differently, as to both its grade and function. Plaintiff offers no rebuttal of this explanation, nor does she cast any doubt on its validity."); *Carter* v. *Pena,* 14 F. Supp. 2d 1,6 (D.D.C. 1997)

Likewise, Ms. Witt determined that plaintiff was unqualified for the ILAB 07-157 position under the DE appointment criteria for the same reason that he was unqualified for the

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ILAB 07-068 position - - he did not possess one year of specialized experience at the GS-14 level. *(Id"* 15(e), (g)-(j).) Ms. Witt indicates that Mr. Wedding "was selected from the certificate of eligibles for vacancy announcement ILAB 07-157M." *(Id. para. 16.)* This explanation more than satisfies the DOL's burden of articulating a legitimate,nondiscriminatory reason for its failure to promote plaintiff to the position in response to either of these vacancy announcements. Accordingly, plaintiff was required to set forth evidence that "could allow a reasonable trier of fact to conclude that [defendant's] proffered reasonls] [were] a pretext for discrimination." *Paquin* v, *Fed. Nat 'l Mortgage Ass 'n,* 119 F 3d 23, 27-28 (D.C Cir. 1997). Plaintiff, however, has made no attempt to rebut defendant's reason. In his complaint, plaintiff alleges that Mr. Wedding had "lesser qualifications in 'trade policy and negotiations'" than plaintiff and that Mr. Wedding, in order "to perform the duties of the position, was in need of formal and informal training" by plaintiff and others. (Compl para. 41,-42.) However, plaintiff has not

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("[P]laintiff failed to establish a prima facie case because no one was ever hired for the vacant position, and the vacancy was ultimately canceled."), *aff'd,* 1998 WL 315616, at *1 (D,C. Cir. Apr. 8, 1998).

presented any evidence to refute defendant's showing that plaintiff did not satisfy the requirements for the position.[14]
Thus, because plaintiff "has produced no direct evidence of discriminatory [or retaliatory] animus by the decisionmaker and failed to produce any other evidence that discredits the underlying reason" for his failure to be selected, defendant is entitled to summary judgment on these claims. *Baloch v. Kempthorne,* 550 F.3d 1191, 1198 (D.C. Cir. 2008).

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C. Denial of WGI

Plaintiff also alleges that he was subjected to discrimination based on his race and age and to retaliation based on his prior EEO activity when he was denied a WGI in December 2007, Defendant responds by arguing that plaintiffs WGI was properly withheld because his most recent rating of record at the time was "Minimally Satisfactory," which evidenced less than satisfactory performance, *(See* Schoepfle

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[14]In *Brookens* 1, this Court also found that plaintiff could not show pretext for defendant's. failure to promote him to the position of a GS-14/GS-15 Deputy Director of the Office of International Relations, which was advertised under MS procedures, because he failed to meet the time-in-grade requirement for the job, since he did not possess the required 52 weeks of time- in-grade experience at the GS-14 level, This finding was affirmed on appeal and is equally binding here as to the position advertised in the ILAB 07-068 vacancy announcement, since plaintiff also applied for that position under MS appointment criteria.

Decl. paras. 10-11; Wedding Decl. para. 5; First Witt Decl., para. 18.)

Plaintiffs overall "Minimally Satisfactory" performance rating was based on the "needs to improve" rating that he had received on element 4 of his performance standards[15] (Def.ts Ex, A, *Brookens v, Dep't of Labor,* MSPB No. DC-531 0-08-0302-1-1, at 2 (May 1, 2008).) According to Mr. Wedding, he denied plaintiffs WGI based on his deficient performance of element 4 as evidenced by his performance rating and on perceived subsequent performance deficiencies, including plaintiff's alleged continued unwillingness to accept additional assignments. *(See id.;* Wedding Decl, para. 5.) Mr. Schoepfle indicates that he upheld the denial of plaintiffs WGI on a similar basis, *(See* Schoepfle Decl. para. 11 (stating that he upheld the denial of plaintiffs WGI "because he failed to achieve at least 'Meets' performance in a critical element of his performance evaluation plan").

A rating of "Minimally Satisfactory" indicates that the employee "[n]eed[s] to improve

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[15]Takes on assignments given, and assumes other responsibilities as work schedule permits and with supervisor's approval. Otherwise works cooperatively and effectively with colleagues in ILAB and in the broader community of stakeholders to promote the mission and strategic objectives of the Bureau.

(Def 's Ex. A, *Brookens* v. *Dep 't of Labor,* MSPB No. DC-531 D-08-0302-1-1, at 2 (May 1,2008),)

performance for one or more elements," *(See* Schoepfle Decl., Attach. 1) Element 4 was:

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Pursuant to regulations governing WGIs:

An employee paid at less than the maximum rate of the grade of his or her position shall earn advancement in pay to the next higher step of the grade or the next higher rate within the grade ... upon meeting the following ... requirements established by law:

(a) The employee's performance must be at an acceptable level of competence. ... To be determined at an acceptable level of competence, the employee's most recent rating of record ...shall be at least Level 3 ("Fully Successful" or equivalent).

5 C.F.R. § 531 404(a); *see also* 5 U.S,C. § 5335(a)(B) (providing for periodic within grade step increases for federal employees provided that "the work of the employee is of an acceptable level of competence as determined by the head of the agency"). Accordingly, because plaintiff was found not to be performing at an acceptable level of competence, defendant claims that his WGI was properly denied.

By articulating a legitimate nondiscriminatory reason for its denial of plaintiff's WGI, defendant has satisfied its burden. Once again, however, plaintiff makes no attempt to refute defendant's rationale. Instead, he claims that he needs discovery in order to

respond. This claim is especially hollow with respect to the denial of his WGL This issue was fully litigated before the MSPB, where plaintiff and defendant, both of whom were represented by counsel, introduced evidence. (*See* Def 's Ex, A, *Brookens* v. *Dep' of Labor,* MSPB No. DC-531D-08-0302-I-I, at 5-7,11-12 (May 1,2008) (rejecting plaintiffs claim of discrimination and retaliation with respect to the WGI based on a record that included testimony by plaintiff and other DOL employees and documentary evidence).) Given these circumstances, plaintiff's refrain that he needs discovery before he can offer any rebuttal to defendant's evidence cannot be sustained. Defendant, therefore, is entitled to summary judgment on this claim.

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D. Rule 56(1) Request for Discovery

As he did in *Brookens* I, plaintiff attempts to stave off summary judgment by invoking Rule 56(f), and he also moves to stay the proceeding on the ground that he needs discovery to obtain "statistical data as to Defendant's hiring, promotion, desk audits, step increases, grade increases, performance evaluation and firing practices." (Pl.'s Mot. to Stay at 2; *see also* Brookens Aff. ,r5.) In addition, plaintiff avers that discovery will enable him to prove his case by revealing discrimination and retaliation in the DOL's treatment of plaintiff, as well as the lack of black

supervisors and professionals and a history of discrimination in ILAB.[16] *(See* Brookens Aff., paras. 6-14.)

While summary judgment ordinarily "is proper only after the plaintiff has been given adequate time for discovery," *First Chicago Int'l* v. *United Exch. Co.*, 836 F.2d 1375, 1380 (D.C. Cir. 1988), under Rule 56(£), a party opposing a summary judgment motion must "show[] by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition," In this regard, the opponent of summary judgment must provide the "requisite specificity" to justify his request for discovery. *See Brookens* v. *Solis*, No. 08-5527 (D.C. Cir, May 8, 20(9) (citing

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[16]Plaintiff also points to various "unresolved factual discrepancies," which he claims could be resolved through discovery. The alleged discrepancies involve (1) a Certificate of Eligibles pursuant to which plaintiff was deemed eligible in July 2004 for a OS-14 position as a policy analyst with another federal agency; (2) the selection of Anne Zollner, "a non-economist, younger white female" as the successor to Timothy Wedding as Chief of the Trade Policy and Negotiations Division; and (3) the promotion of Mr. Wedding, "a younger white male," to Deputy Director of the Office of Trade and Labor Affairs, (Opp'n at 2.) However, none of these personnel actions is at issue in this case. Moreover, plaintiff did not apply for either of the two ILAB vacancies he mentions. *(See* Declaration of Ericka C. Witt, dated April, 2009 ["Second Witt Decl.] para. 4-7.) Although plaintiff does complain here about his failure to be considered or selected for the division chief position that Ms. Zollner obtained, his complaint concerns *earlier* vacancy announcements, and he does not allege that Ms. Zollner failed to meet the agency's requirements for the position. Thus, these personnel actions are irrelevant.

Messina v. *Krakower,* 439 F.3d 755, 762 (D.C. Cir. 2006) ("A party making a Rule 56(f) request must state[] concretely why additional discovery is needed to oppose a motion for summary judgment.") (citation and internal quotation marks omitted»; *Byrd* v. *EPA,* 174 F.3d 239, 248 n.8 (D.C. Cir. 1999) (party seeking discovery bears the burden of identifying the facts to be discovered that would create a triable issue and reasons why the party cannot acquire those facts without discovery to challenge a motion for summary judgment); *Strang* v. *u.s. Arms Control & Disarmament Agency,* 864 F.2d 859, 861 (D.C. Cir. 1989) (plaintiff must "state with sufficient particularity ... why discovery [is] necessary). Plaintiff has again failed to meet this standard despite having been told of the requirements of Rule 56(f) in *Brookens, I* and having been reminded by the Court's *Fox/Neal* Order of January 6, 2009, of the need to provide evidence to contradict defendant's assertions in its affidavits. As an initial matter, the lack of discovery has no relevance to defendant's arguments under Rule 12(b)(6). And, as to defendant's summary judgment arguments, plaintiff fails to provide sufficient particularity to justify his request for discovery. Instead, he presents conclusory assertions that amount to nothing more than a claim that he could prove his case if only he were permitted discovery. Nor has he shown how the laundry list of statistical data that he seeks would undercut

defendant's explanations for its actions.[17] Moreover, the matters at

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issue involve matters that are within plaintiffs knowledge to dispute, so there is no excuse for his failure to offer any rebuttal to defendant's evidence.

For these reasons, there is nothing to suggest that plaintiffs vague request for discovery would result in his being able to create a triable issue of fact. Therefore, the Court will deny plaintiffs motion for a stay and his Rule 56(f) request for discovery.

CONCLUSION

For the foregoing reasons, the Court will grant defendant's motion to dismiss complaint

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[17]Plaintiff's reliance on *Fitzgerald v. Henderson*, 251 F.3d 345 (2d Cir. 2001), is unavailing. In that case, the plaintiff sought recovery for discriminatory conduct that occurred outside the applicable limitations period under the "continuing violation theory," which, according to the district court, required plaintiff to show a "formal policy or that discrimination was 'widespread.'" 251 F.3d at 362. In those circumstances, the Second Circuit held that "[f]aulting [plaintiff] for failure to make a showing of a formal policy - - or of other matters that would similarly be beyond her knowledge - - was incompatible with the court's denial of discovery." *Id.* In this case, however, there is no allegation that any of the discrete acts of discrimination alleged by plaintiff are untimely. Thus, the continuing violation theory is irrelevant here.

or in the alternative for summary judgment and will deny plaintiff's motion to stay. A separate Order accompanies this Memorandum Opinion.

/s/
ELLEN SEGAL HUVELLE
United States District Judge

Date: May 21, 2009